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C v. A

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[DIVORCE PETITION NO: S2-33-861-1997]
3 JUNE 1998

b

FAMILY LAW: *Divorce - Reconciliation - Reference to conciliatory body - Law Reform (Marriage and Divorce) Act 1976, s. 106 - Non-compliance - Whether fatal - Reconcialiation by relatives - Whether acceptable - Section 106(3) - Section 106(1)(vi) - Whether reference impracticable - Exceptional*
c *circumstances - Evidence - Section 55 - Rules of court - Inherent jurisdiction*

WORDS & PHRASES: *"Impracticable" - Law Reform (Marriage and Divorce) Act 1976, s. 106(1)(vi) - Impractical - Fruitlessness - Futility - In vain*

d The petitioner and the respondent were married in 1969 and have two children, now aged 29 and 25. They cohabited together until 1975 when the petitioner left the matrimonial home and set up his own home due to misunderstandings. Cohabitation was resumed during the early part of 1976 at the petitioner's home but the respondent left in the later part of 1976. Since then neither party
e had had anything to do with the other and they had lived apart for more than 20 years. Attempts at reconciliation were made by the petitioner's relatives but without success. The petitioner now petitioned for a dissolution of the marriage with the respondent.

The respondent raised the preliminary objection that as the matrimonial
f difficulty was not first referred to a conciliatory body constituted under the Law Reform (Marriage and Divorce) Act 1976 ('the Act') there was non-compliance with s. 106 of the Act. It was submitted that reconciliation attempts by relatives were not sufficient for the purposes of the Act.

g The petitioner, however, submitted that he was relying solely on the ground of exceptional circumstances as provided in proviso (vi) to s. 106(1) of the Act ('the said proviso') and was hence exempted from having to refer their matrimonial difficulty to a conciliatory body. It was argued that since both parties had lived apart for 20 years, and had had no communication between them for all these years, a rubber stamp from a reconciliatory body that it
h was unable to resolve the matrimonial difficulty would serve no purpose.

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Held:

[1] If a petition is filed and it becomes necessary for the petitioner to comply with the said proviso, so long as a preliminary objection is taken by the respondent, it is sufficient for the petitioner to either give oral or affidavit evidence to satisfy the court that there are exceptional circumstances.

[2] Pursuant to the said proviso, it is open to the petitioner to satisfy the court that the rules of the court allow him to rely on the fact that he has sought the assistance and advice of persons, namely his relatives. This is an appropriate case to invoke the inherent powers of the court as set out in O. 92 r. 4 of the Rules of the High Court 1980 to prevent injustice. Attempts by relatives to reconcile the parties ought to be accepted and read together with s. 55 of the Act and the said proviso.

[3] The marriage had broken down through 20 years of separation, and neither party had shown any desire towards the continuance of the union, and there were no infant children involved to motivate a desire for the continuance of the marriage. All these factors clearly showed exceptional circumstances falling within the said proviso.

[4] The word impracticable in the said proviso means impractical. This connotes fruitlessness, a sense of futility, and performing an act in vain or where it is not practical or workable to perform such an act. This was precisely what the petitioner would be doing if he were to refer to a conciliatory body. Such a referral would be an exercise in futility performed solely for the purpose of obtaining a rubber stamp to a certificate showing the failure of the body to effect a reconciliation.

[Preliminary objection dismissed.]

Case referred to:
Bowman v. Bowman [1949] 2 All ER 127 CA ***(refd)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 55, 106
Rules of the High Court 1980, O. 92 r. 4

Other source referred to:
The Concise Oxford Dictionary, 9th edn

For the petitioner - Theresa George; M/s Thakurdas Jethwani & Co
For the respondent - Evelyn Khoo; M/s Azman Davidson & Co

Reported by Ling Hea Hoon

JUDGMENT

RK Nathan J:

Facts

On 17 April 1969 the petitioner married the respondent. They lived and co-habited together in Kuala Lumpur and have two children now aged 29 and 25. Sometime in 1975 the petitioner left the matrimonial home and set up his own home in Sentul, Kuala Lumpur, due to misunderstanding. However, the respondent resumed co-habitation at Sentul during the early part of 1976 and left the petitioner's home at the later part of 1976. Since then neither party has had anything to do with the other and they have lived apart for more than 20 years. The petitioner stated in his petition that attempts at reconciliation were made by the petitioner's relatives, without success. The petitioner prayed for a dissolution of the marriage and was prepared to pay the costs.

Preliminary Objection

Before filing an answer to the petition, the respondent raised a preliminary objection which was that there was non-compliance with s. 106 of the Law Reform (Marriage and Divorce) Act 1976 (the Act). The said section reads:

> 106 Requirement of reference to conciliatory body before petition for divorce
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> (1) No person shall petition for divorce, except under sections 51 and 52 unless he or she has first referred the matrimonial difficulty to a conciliatory body and that body has certified that it has failed to reconcile the parties:
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> Provided that this requirement shall not apply in any case -
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> (i) where the petitioner alleges that he or she has been deserted by and does not know the whereabouts of his or her spouse;
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> (ii) where the respondent is residing abroad and it is unlikely that he or she will enter the jurisdiction within six months next ensuing after the date of the petition;
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> (iii) where the respondent has been required to appear before a conciliatory body and has wilfully failed to attend;
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> (iv) where the respondent is imprisoned for a term of five years or more;
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> (v) where the petitioner alleges that the respondent is suffering from incurable mental illness; or
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> (vi) where the court is satisfied that there are exceptional circumstances which make reference to a conciliatory body impracticable.

(2) A matrimonial difficulty may be referred to any conciliatory body acceptable to both parties but, where they are unable to agree on a conciliatory body, shall be referred to the marriage tribunal for the area in which they reside or, where they are living in different areas, to the marriage tribunal for the area in which they had last resided together.

(3) A "conciliatory body" means -

(a) a council set up for the purposes of reconciliation by the appropriate authority of any religion, community, clan or association; or

(b) a marriage tribunal; or

(c) any other body approved as such by the Minister by notice in the Gazette.

(4) A marriage tribunal shall be set up for such specified area or district as the Minister may decide, consisting of a Chairman and not less than two nor more than four other members who shall be nominated by the Minister, or by such officer to whom the Minister may have delegated his powers to in that behalf.

(5) (a) A conciliatory body to which a matrimonial difficulty has been referred shall resolve it within the period of six months from the date of reference; and shall require the attendance of the parties and shall give each of them an opportunity of being heard and may hear such other persons and make such inquiries as it may think fit and may, if it considers it necessary, adjourn its proceedings from time to time.

(b) If the conciliatory body is unable to resolve the matrimonial difficulty to the satisfaction of the parties and to persuade them to resume marriage life together, it shall issue a certificate to that effect and may append to its certificate such recommendations as it thinks fit regarding maintenance, division of matrimonial property and the custody of the minor children, it any, of the marriage.

(c) No advocate or solicitor shall appear or act as such for any party in any proceeding before conciliatory body and no party shall be represented by any person, other than a member of his or her family, without the leave of the conciliatory body.

Case For The Respondent

Ms. Evelyn Khoo for the respondent rested her case solely on the admitted non-compliance of s. 106 of the Act. Since it was expressly pleaded that reconciliation was unsuccessfully attempted by the relatives of the petitioner and not a conciliatory body as defined by s. 106(3) of the Act she asked for the petition to be struck out.

Case For The Petitioner

Ms. Theresa George for the petitioner in tracing back the historical reason for the implementation of s. 106 submitted that it was done for the support of the union of marriage, the protection of children, the removal of hardship and for the reduction of illicit unions.

Arguing that she was relying solely on proviso (vi) to s. 106(1) she submitted that since both parties had lived apart for well over 20 years this itself was clearly an exceptional circumstance within the meaning of proviso (vi). There has been no communication between the parties for these years and therefore no purpose was to be served by merely having a rubber stamp from the reconciliatory body that it was unable to resolve the matrimonial difficulties and to persuade the parties to resume co-habitation.

With regard to the meaning of the word "impracticable" as stated in proviso (vi) she argued that this meant that the continued union of the marriage was no longer feasible.

Findings Of The Court

It is rather surprising that after 22 years of incorporating s. 106 into the Act, there has been no reported case on this.

Reason For The Introduction Of s. 106

The Royal Commission

A Royal Commission was set up before the amendment of the Act to look into various issues relating to the marriage and divorce laws of non-Muslims. Its report called "Report of the Royal Commission on Non-Muslim Marriages and Divorce Laws" was dated 15 November 1971 (the Report). I shall confine my review of the report to issues related to s. 106 of the Act. Whilst recommending that marriages ought to be dissolved under circumstances which make it "just and reasonable" and that enquiries should be made by the court into facts to satisfy itself that the marriage had indeed irretrievably broken down, the report also recommended:

> that attempts at reconciliation be made before the filing of any petition for divorce and that proceedings in court may be adjourned at any stage and for such period as the court thinks fit, to encourage reconciliation;

In relation to the reconciliation aspect of its report the Commission was of the view that since in Christian churches and communal bodies among Chinese and Hindus there are respected elders whose words are listened to with respect, their services together with that of justices of peace may be utilised for the setting up of conciliation councils.

The Denning Report

With a view to promoting reconciliation for saving marriages and being part of a rhetoric of divorce reform the United Kingdom Government established a committee headed by Mr. Justice Denning (as he then was). The Denning Report (as it was called) recommended that "reconciliation should be attempted in every case where there is a prospect of success" (see *Cmd* 7024, para 3).

Reconciliation

In *Bowman v. Bowman* [1949] 2 All ER 127 CA a wife sought leave to present a petition for divorce although 3 years had not passed, on the ground of exceptional hardship suffered by her or exceptional depravity on the part of the husband. The court held that the really important consideration was to see whether there was any chance of a reconciliation. On this point it held that it was material for the court to enquire what the applicant had already done to try to make the marriage a success or to become reconciled. It went on to hold that if the court was not satisfied that all which is reasonable has been done in that respect, it might well dismiss the application.

Prerequisite

It is clear that pursuant to s. 106(1) of the Act, obtaining a certificate from the conciliatory body that it has failed to reconcile the parties is a pre-requisite, subject to the provisos. It would seem that whilst provisos (i)-(v) to s. 106 suggest that the mere averment of such facts in the petition would suffice, proviso (vi) suggests that the court must be satisfied of the existence of the exceptional circumstances. This leads to the suggestion that evidence must be led for the court to make that decision. Does this mean that if a petitioner intends to rely on proviso (vi) to s. 106, the petitioner must first file an originating summons stating facts which the court ought to rely on, and upon being so satisfied, to give leave to the petitioner to then file a petition. I do not think so. It is not the intention of Parliament to cause hardship to litigants and more so in divorce matters where it might become necessary for parties to put an end to their marriage as soon as possible, so as to start their lives afresh. It is my judgment that if a petition is filed and it becomes necessary for the petitioner to comply with the proviso (vi) to s. 106, so long as a preliminary objection is taken by the respondent, it is sufficient for the petitioner to either give oral or affidavit evidence to satisfy the court that there are exceptional circumstances.

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Intention Of s. 106

It is obvious that the purpose and intent of s. 106 is to reconcile parties where there is a reasonable probability of a reconciliation. In fact s. 106(5)(b) of the Act provides that together with the certificate it issues, the conciliatory body can make recommendations regarding maintenance, division of matrimonial property and the custody of the minor children, if any, of the marriage. In other words it is apparent that the elders of the religion, community, clan or association (see s. 106(3)(a) of the Act) who might be even familiar with the parties and their situation in life could therefore make recommendation for the preservation of the property and the welfare of the minor children. I have also to consider if there is any wilful refusal to refer to a conciliatory body. I have also to consider whether the parties are young and whether it is appropriate to write off their prospects of reconciliation as hopeless and whether the guidance of the conciliatory body which oft times has proven valuable in promoting a stable and satisfactory reconciliation, would prove beneficial to this case.

Section 55 Of The Act

The said section reads:

> 55 Provisions designed to encourage reconciliation
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> (1) Provision may be made by rules of court for requiring that before the presentation of a petition for divorce the petitioner shall have recourse to the assistance and advice of such persons or bodies as may be available for the purpose of effecting a reconciliation between parties to a marriage who have become estranged.
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> (2) If at any stage of proceedings for divorce it appears to the court that there is a reasonable possibility of a reconciliation between the parties to the marriage, the court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a reconciliation. The power conferred by the foregoing provision is additional to any other power of the court to adjourn proceedings.

It seems to me that pursuant to this section recourse can be made to the rules of the court for a petitioner, before presenting a petition, to rely on such rules to show that the petitioner has sought **the assistance and advice of such persons or bodies as may be made available for the purpose of effecting a reconciliation** (emphasis provided). Whilst this section refers to the availability of persons or bodies, s. 106 relies only on the requirement of the need to refer to a reconciliatory body.

It is my judgment that pursuant to proviso (vi) of the Act, it is open to the petitioner to "satisfy the court" that the rules allow him to rely on the fact that he had sought the assistance and advice of persons, namely his relatives. It is my judgment that this is a truly appropriate case to invoke the applicability of O. 92 r. 4 of the Rules of the High Court 1980 (the Rules) which reads:

> 4 Inherent powers of the court (O. 92 r. 4)
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> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

I therefore hold that to prevent injustice it is appropriate for this court to hold that attempts by "saudara mara" (relatives) to reconcile the parties ought to be accepted and read together with s. 55 and proviso (vi) to s. 106 of the Act.

Exceptional Circumstance

I hold that the very fact that both parties had lived apart with no contact with one another for well over 20 years is *prima facie* evidence that each of them is entitled to a dissolution of the marriage which to my mind has been a marriage in name only and not in substance, in law only yet not in fact. I further hold that it is not conducive to public interest that a man and a woman should remain bonded in matrimonial permanence, when the duties and responsibilities of such a hallowed institution have long ceased to be observed by either party. Any further continuance of this union might possibly lead to immorality and infidelity.

Further there is no cause for concern in so far as the children are concerned. They are both 29 and 25 years old respectively. There is also no prayer for maintenance. It is a case of a prayer for dissolution simpliciter.

Again this is not a case where no attempts have been made at reconciliation. In the absence of any denial on the part of the respondent it must be taken that the relatives of the petitioner did attempt a reconciliation. In this case in any event I am satisfied that there is certainly no reasonable possibility of a reconciliation. Their living apart for 20 years without any contact with one another clearly indicates the impracticability of both parties getting back together. I therefore hold that the very fact that the marriage has broken down by the fact of over 20 years of separation, and that neither party had shown any desire towards the continuance of the union and that there are no infant children involved to motivate a desire for the continuance of the marriage, that a consideration of all these factors clearly show exceptional circumstances, falling within proviso (vi) to s. 106 of the Act.

Impracticable

Proviso (vi) to s. 106 clearly enunciates that I must be satisfied that having found that there are special circumstances, I must also find that such special circumstances make reference to a conciliatory body impracticable.

The object of construing an act is to ascertain the intention of Parliament. The common sense meaning of "impracticable" to my mind is that a thing can only be done at an excessive or unreasonable cost. But how would the question of excessive costs apply to the use of the word "impracticable" in the context in which it is used in proviso (vi) to s. 106 of the Act. The conciliatory body is clearly defined in s. 106(3). It is just a matter of writing to the body to fix appointments. The question of costs or that it is excessive is not an issue. Therefore it is clear that the word impracticable means impractical. The *Concise Oxford Dictionary* 9th Edn defines "impractical" as "not practicable". Impractical would therefore present a meaning connoting fruitlessness, a sense of futility, and performing an act in vain or where it is not practical or workable to perform such an act. This is just precisely what the petitioner would be doing in this case if he were to refer to the conciliatory body. To my mind such a referral would be an exercise in futility performed solely for the purpose of obtaining a rubber stamp to a certificate showing the failure of the body to effect a reconciliation.

I am therefore satisfied that having considered all the facts relevant to the consideration of the preliminary objection, such an objection must indeed fail. It is therefore dismissed with costs.